

# Settling Defendants Response to USEPA's July 22, 2015 revised Scope of Work for Lusher St. Superfund Site OU-1 Interim Action

August 10, 2015

The Settling Defendants (SDs) have analyzed USEPA's July 22, 2015, revised Scope of Work for the Lusher Street OU-1 Interim Action ("Revised SOW"). The Revised SOW was prepared in response to the SDs' June 19, 2015 Outline for Refinement of Groundwater and Vapor Intrusion Areas of Concern ("SD Outline"). After discussing the Revised SOW with our technical consultant, August Mack, the SDs propose the following alternative which will serve the OUI Interim Remedy's objective of protecting human health from known, immediate, harms.<sup>1</sup>

As previously proposed by the SDs, the Main Plume Area is within the groundwater AOC and occupied properties without water service in this area will be subject to the groundwater Interim Action.

The SDs are willing to accept a SOW that provides all occupied properties within the VI AOC with VI mitigation systems, even though the ROD concedes that less than half of these properties need such systems. (ROD at 10.) The SDs also are willing to include occupied properties in Areas 4 and 5 without water service in the groundwater Interim Action instead of pursuing a predesign investigation into whether a human health risk actually exists in those areas.

For the reasons discussed in more detail below, the SDs maintain their position that Areas 3 and 6 do not need the kinds of immediate remedies that the OUI Interim Remedy provides.<sup>2</sup>

## Area 3

The SDs cannot agree to an Interim SOW for Area 3. The EPA has not provided a credible basis for the inclusion of Area 3, and all the evidence currently available shows that if there are impacts in this Area that require remedial action, they were not caused by a SD.

(i) Area 3 is upgradient and/or crossgradient of all SDs' facilities.

As the ROD acknowledges, groundwater flows in and around Area 3 go northerly to the St. Joseph River. All of the SDs are downgradient or crossgradient of the "spot plume" and

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<sup>1</sup> Terms defined in the SD Outline are used herein and given the same meaning. For your convenience the SD Outline is attached as Exhibit A.

<sup>2</sup> The SDs acknowledge and appreciate USEPA's postponements of Areas 1 and 2 in its Revised SOW. As such, the reasons for these postponements are not repeated here

could not possibly have contributed any hazardous substances to Area 3.<sup>3</sup> As such, there is no basis under CERCLA for holding the SDs liable for any remedy related to the “spot plume.”

*(ii) The spot plume in Area 3 is a separate and distinct plume from the Lusher Street Plume.*

As shown in the Final Remedial Investigation Report, the spot plume is separate from the Lusher Street Plume. Groundwater grab samples taken between the spot plume and the Lusher Street Plume showed no detectable levels of contaminants. The two distinct plumes are clearly depicted in Figure 5-8 of the Final Remedial Investigation Report. As a legal matter, the existence of separate and distinct plumes is a basis for divisibility under CERCLA. *See United States v. Hercules*, 247 F.3d 706, 717 (8th Cir. 2001); *Akzo Coatings, Inc. v. Aigner Corp.*, 881 F. Supp. 1202, 1210–11 (N.D. Ind. 1994), *modified*, 909 F. Supp. 1154 (N.D. Ind. 1995). Thus, even if it can be established that the SDs are liable for the Lusher Street Plume (which the SDs deny), such liability would not also translate into liability for the spot plume.

The spot plume is directly north of the Gemeinhardt Plume. Gemeinhardt had numerous well documented releases of chlorinated solvents. The spot plume (if it exists) is more likely an off-shoot of the Gemeinhardt Plume. Further, the exclusion of Area 3 is also an issue of fairness: The ROD excuses Gemeinhardt from responsibility for the spot plume---despite its upgradient location and history of releasing chlorinated solvents into Elkhart’s groundwater---specifically because its plume appeared to be disconnected from the spot plume. (ROD at p.8) If the EPA is unwilling to revisit that reasoning, it should at least apply the same logic to the “spot plume” and the SDs to exclude Area 3 from the Interim SOW.

*(iii) There is no evidence that private wells in Area 3 are contaminated.*

The spot plume’s existence is doubtful. Its existence is based solely on the detection of TCE at the water table in a one-time, Geoprobe grab sample (GW-04). The detection of TCE was below the MCL (3.1 ug/L). (The EPA has acknowledged that Geoprobe grab samples are biased high.) Fifteen private wells have been sampled in Area 3 since 2006. (Six private wells in 2006 and nine private wells in 2010). Since 2006, all private well results have been reported as nondetect with the exception of one private well where TCE was reported well below the MCL (0.46J ug/L).

As such, there is no evidence that a remedy in the area of the spot plume is necessary to protect human health or the environment. Area 3 is not part of the VI AOC. It is outside of EPA’s 500-foot groundwater buffer zone. Area 3 private wells have not had a detection of TCE

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<sup>3</sup> Zurn has corresponded with you separately about Area 3.

greater than the MCL since 1987. Thus, there is no evidence of a threat to human health from vapor intrusion or drinking water contamination in Area 3.

#### Area 6

Area 6 should also be postponed from the OU1 Interim SOW because there is no evidence that the health of residents in that area are at risk. The EPA does not have any evidence in Area 6 from private well sampling that TCE is impacting private wells. One private well (Property No. 34) was sampled in 2010 in which TCE was reported as non-detect. This sample was the only private well sample collected in this Area, further reinforcing the impression that this is not an area where human health is endangered by a groundwater plume.

Indeed, the evidence does not suggest the presence of chlorinated solvents in the groundwater here. Area 6 is cross-gradient from the main plume, and to date the EPA has not provided a theory for how discharges by one or more SDs could have travelled there. Furthermore, the EPA's grab groundwater sampling in Area 6 did not reveal any TCE detections at the water table. PCE was detected at sub-MCL levels at sample location GW -52 from a one time, grab groundwater sampling location below the MCL (4.1 ug/L).<sup>4</sup>

With no significant presence of chlorinated solvents, there is not a reasonable basis to include Area 6 in the vapor intrusion work to be conducted as part of the Interim OU1 remedy. Indeed, the eastern portion of Area 6 is outside of the EPA's VI AOC.

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<sup>4</sup> The EPA considers the Geoprobe® grab samples to be biased high (2013 RI, pg. 5-9).